PICHIRILO v. GUZMAN: RIGHTS OF A LONGSHOREMAN FOR UNSEAWORTHINESS IN A DEMISE CHARTER

A recent decision of the United States Court of Appeals for the First Circuit, sitting in admiralty, vacated a decision of the District Court of Puerto Rico imposing liability upon a shipowner for injuries incurred by a longshoreman, resulting from the alleged unseaworthiness of the ship on which he was working at the time of the injury. The case, *Ruiz Pichirilo v. Maysonet Guzman*,[1] involved a demise charter[2] under which the demisee, who was also the libellant's employer, had maintained complete control of the ship for some five years prior to the accident.[3] The ship, the M/V *Carib*, was being unloaded at San Juan, Puerto Rico, when the injury occurred. A shackle supporting a boom of the ship broke, causing the boom to fall on the libellant, who was working on deck at the time. The evidence showed that the shackle had been recently bought.

The libel was brought in rem[4] against the *Carib* and in personam against the shipowner[5] for unseaworthiness arising ostensibly from the defective condition of the shackle. The District Court found the vessel to be unseaworthy as alleged and imposed liability on the ship and the vessel owner, Pichirilo.[6] On appeal, the Circuit Court, in an opinion by Judge Aldrich, vacated the judgment below and remanded with orders to dismiss, holding that the libel in personam was barred because the unseaworthy condition obtained after

1. 290 F.2d 812 (1st Cir. 1961), *cert. granted*, — U.S. —, 82 Sup. Ct. 176 (1961) (No. 358).

2. In a demise charter, as distinguished from a time or voyage charter, command, possession, and navigation of the vessel are vested solely in the demisee. This arrangement is analogous to a lease of real property wherein the exclusive right to possession is in the lessee, the lessor retaining only a reversion. It has been stated:

> The test is one of "control"; if the owner retains control over the vessel, merely carrying the goods furnished or designated by the charter, the charter is not a demise; if the control of the vessel itself is surrendered to the charterer, so that the master is his man and the ship's people are his people, then we have to do with a demise.

GILMORE AND BLACK, THE LAW OF ADMIRALTY § 4-21 (1957).

3. The District Court had ruled that no demise existed, but the Circuit Court, considering that ruling clearly erroneous, held that a demise was established by the evidence. Pichirilo v. Guzman, *supra* note 1, at 813. That a demise charter did exist is assumed herein; however, on appeal, the issue of the propriety of the Circuit Court's ruling will be before the Supreme Court.

4. The maritime in rem proceeding is unique in that it is literally a suit "against the ship," the vessel itself being considered a distinct party defendant. Furthermore, an action in rem will lie only when the subject of the claim is a maritime lien, such as an action for seaman's wages or an action based on the unseaworthiness of a ship. See Todd Shipyards Corp. v. City of Athens, 83 F. Supp. 67 (D. Md. 1949); GILMORE AND BLACK, *op. cit. supra* note 2, §§ 9-1 to 9-4.

5. Libellant Guzman, who had received a compensation allowance from the State Insurance Fund pursuant to the Puerto Rico Workmen's Compensation Act, 11 L.P.R.A. ch. 1 (1935), was thereby precluded from bringing any action against his employer, the demisee.

6. Guzman v. M/V Carib, Admiralty No. 39-58, D. Puerto Rico, Oct. 16, 1959.

the demise, and that the libel in rem failed in the absence of any personal liability. This Note will consider these holdings in light of the development and ramifications of the doctrine of unseaworthiness.

In its origin, the doctrine of unseaworthiness was merely a device enabling insurers to avoid indemnifying owners for the loss of ships and goods at sea.[7] The initial application to seamen occurred in cases of desertion of vessels or abandonment of ships' duties by crew members, such derelictions normally being punishable by forfeiture of wages. Upon a showing that the vessel was unseaworthy, the seamen were permitted to recover wages due.[8] The next step involved the famous "second proposition" of *The Osceola,*[9] an unprecedented dictum that a ship and its owner would incur liability to indemnify a seaman for personal injury resulting from the unseaworthiness of the ship. The nature of such an indemnity was subsequently clarified by Judge Augustus N. Hand in *The Scandrett,*[10] an action for personal injury based on unseaworthiness in the absence of negligence.[11] Reviewing the authorities, Judge Hand concluded that the duty to furnish a seaworthy ship was absolute.[12] This evolution constitutes a remarkable example of common law growth and change, if not "a frank excursion into

7. 1 CAINES, AN ENQUIRY INTO THE LAW MERCHANT OF THE UNITED STATES 308 (1802).

8. See Dixon v. The Cyrus, 7 Fed. Cas. 755 (No. 3930) (D. Pa. 1789).

9. 189 U.S. 158 (1903). The four "propositions," stated in the opinion, *supra* at 175, are substantially as follows: (1) that the vessel and its owner are liable for any sickness or injury of a seaman to the extent of his maintenance and cure and for his wages to the end of the voyage; (2) that the vessel and its owner are liable to indemnify a seaman for injuries received as a consequence of the unseaworthiness of the ship; (3) that all crew members except the master are fellow servants, and injuries sustained through the negligence of a fellow servant are not compensable beyond the allowance for maintenance and cure; and (4) that injuries occasioned by accident or the negligence of the master or any crew member are not compensable beyond the allowance for maintenance and cure. The *Osceola* case was a negligence action, the decision holding that a vessel would not incur liability in rem predicated upon the negligence of its master; hence, propositions (1), (3), and (4) were germane to the issue at hand. Notwithstanding its questionable origin, however, the "second proposition" was destined to take its place among the legal classics.

10. 87 F.2d 708 (2d Cir. 1937).

11. The alleged unseaworthiness was based on a defective ship's doorknob, and the jury had found that the defect "was hidden and latent and not discoverable by ordinary inspection by competent inspectors." *Id.* at 710.

12. In further justification of his decision, Judge Hand noted that shipowners are in a position to insure against similar mishaps, thereby treating such liability as a business expense. *Id.* at 711.

Any lingering doubts regarding the vitality of this proposition were finally dispelled by Mahnich v. Southern Steamship Co., 321 U.S. 96 (1943), a case involving negligently-caused unseaworthiness, wherein the Court voiced approval of *The Scandrett*:

> The Osceola . . . laid down . . . the rule of the *owner's unqualified obligation* to furnish seaworthy appliances . . . . It nowhere intimated that the owner is relieved from liability for providing an unseaworthy appliance, merely because the unseaworthiness was attributable to the negligence of fellow servants of the injured seaman rather than to the negligence of the owner. *Supra* at 101. (Emphasis added.)

[judicial] legislation."[13] However, it is generally conceded that the doctrine is warranted by the perilous circumstances and accommodations foisted upon a sailor, who has no choice but to stay with his ship, seaworthy or unworthy, when underway at sea.

A definition which might be extracted from the variety of conditions which have been held to constitute unseaworthiness is elusive at best, but it seems clear that an "appurtenance" of the vessel, rendered defective, is requisite. Obviously, injuries caused by defective appliances and equipment of the vessel[14] fall within the confines of the doctrine. Likewise, a crew member known to have pugnacious proclivities[15] may render his ship unseaworthy. Equipment brought on board by longshoremen[16] will satisfy the test. Furthermore, appliances in themselves entirely fit, if operated in a negligent manner, may provide instances (or instants) of "transitory unseaworthiness."[17] However, equipment or cargo which has not yet become "appurtenant," such as a crate being lowered into a ship's hold, has been held to be outside the scope of the remedy[18]—but the moment the object is settled on deck it may satisfy the standard.[19]

A line of cases involving ships in "moth-balls," or undergoing major structural repairs, establishes that workmen whose job it is to render a ship seaworthy can hardly be heard to complain of a defect which contributes to the very unseaworthiness they were employed to correct.[20] In these cases

13. Tetreault, *Seamen, Seaworthiness, and The Rights of Harbor Workers*, 39 CORNELL L.Q. 381, 401 (1954).

14. The H. A. Scandrett, *supra* note 10 (doorknob); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (wet ladder); Mahnich v. Southern Steamship Co., *supra* note 12 (rope supplied by mate); Michalic v. Cleveland Tankers, 364 U.S. 325 (1960) (wrench).

15. Boudoin v. Lykes Brothers Steamship Co., Inc., 348 U.S. 336 (1955) (assault by crew member); The Rolph, 299 Fed. 52 (C.C. Cal. 1924) (beatings at hands of mate).

16. DeVan v. Pa. R.R. Co., 167 F. Supp. 336 (E.D. Pa. 1956) (cargo hook); Considine v. Black Diamond Steamship Corp., 163 F. Supp. 107 (D. Mass. 1958) (chisel-truck).

17. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959) (overloaded winch); DiSalvo v. Cunard Steamship Co., 171 F. Supp. 813 (S.D.N.Y. 1959) (poorly rigged baggage chute); Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960) (slime on rail).

18. Carabellese v. Naviera Aznar, S.A., 285 F.2d 355 (2d Cir. 1960), *cert. denied*, 365 U.S. 872 (1961).

19. Reddick v. McAllister Lighterage Line, Inc., 258 F.2d 297 (2d Cir. 1958), *cert. denied*, 358 U.S. 908 (1958).

20. West v. United States, 361 U.S. 118 (1959); Noel v. Isbrandtsen Company, 287 F.2d 783 (4th Cir. 1961), *cert. denied*, 366 U.S. 975 (1961); Latus v. United States, 277 F.2d 264 (2d Cir. 1960), *cert. denied*, 364 U.S. 827 (1960). In West v. United States, *supra* at 122, the Court concluded:

> It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in [a case involving reactivation of a ship in the "moth-ball fleet"]. It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury.

the courts have concluded that the status of a deactivated vessel does not comport with a warranty of seaworthiness to any person, thereby obviating the necessity of determining whether or not the nature of the injured person's employment justifies an award based on unseaworthiness. This reasoning is strictly limited to ships incapable of going to sea, for in all other instances the type of work being performed by the libellant should be controlling—this is in consonance with the apparent purpose of the doctrine, that is, the protection of all those subject to the vicissitudes of the life at sea.[21]

It is clear in the *Pichirilo* case that the equipment in question (boom and shackle) was clearly "appurtenant" and that the status of the *Carib* was such that she did warrant her seaworthiness. Furthermore, it has been well settled since the case of *Seas Shipping Co. v. Sieracki*[22] that the absolute duty to provide and maintain seaworthy appliances is owed to stevedores and longshoremen performing loading and unloading operations. Sieracki was a stevedore employed by an independent contractor; hence, no actual privity or warranty from the shipowner existed. Although the doctrine of unseaworthiness had been declared not incompatible with negligence, nevertheless it was thought to be essentially non-delictual. This thesis was expounded by the respondent in *Sieracki*,[23] and his argument was strengthened by allusion to the accepted term, "warranty of seaworthiness," which seemed to imply a contractual duty with an attendant privity requirement. The Court, however, had little difficulty disposing of this argument: "It is essentially a species of liability without fault . . . neither limited by conceptions of negligence nor contractual in character . . . a form of absolute duty owing to all within the range of its humanitarian policy."[24] The Court further indicated that anyone "performing the ship's service with the owner's consent"[25] was within this broad range. The case thus marked the incorporation of longshoremen "performing the ship's work"[26] into the realm of the duty owed previously only to seamen.

The question of in personam liability in the *Pichirilo* case turns on the issue of the demise charter, because of the determination that the ship-

21. It is submitted that in borderline cases, such as ships undergoing "minor structural repairs" or shipyard availabilities, any doubts should be resolved in favor of "activation," leaving the warranty question to turn on nature of employment.

22. 328 U.S. 85 (1945).

23. *Id.* at 90-93.

24. *Id.* at 94, 95.

25. *Id.* at 97.

26. Although *Sieracki* has been criticized on the grounds that, as an historical fact, the unloading of vessels has never been performed by seamen (Tetreault, *supra* note 13, at 413, 414), this academic inconsistency may perhaps be reconciled by viewing the loading and unloading processes as sufficiently integral in a ship's cycle of operation to be considered "ship's service"—in any event, the proposition of duty owed to stevedores by vessel owners is so well established that it will no longer admit of argument.

owner's duty to maintain his vessel's seaworthiness ceases when he delivers the ship to the demisee. This issue involves a balancing of the non-delegable character of the duty owed against the demise arrangement whereby the respondent owner-demisor relinquishes all control of the vessel to the demisee. Militating against the owner's liability in this situation is a respected corollary to a demise, that the demisee becomes owner *pro hac vice* (herein ostensibly for the purpose of incurring liability for unseaworthiness).[27] There is no question that the demisee stands in the owner's shoes in situations involving collision and negligence.[28] Furthermore, several decisions have held that the putative "ownership" of the demisee bars an action based on unseaworthiness arising after the demise against the actual owner,[29] the reasoning being substantially as follows: notwithstanding the non-delegable aspect of the duty, some privity should exist to justify foisting liability upon the owner—why should he incur liability for a condition over which he has no control?

This reasoning was dispositive of the case of *Canella v. Lykes Bros. S. S. Co.*,[30] wherein the court denied recovery in personam against the owner, indicating however that the controlling factor was that the defect had obtained after the demise. Otherwise (had the defect existed at the time the owner turned over the vessel to the demisee) the liability of the owner in personam would follow because, at some previous time, he had been in a position to correct it. Similar holdings have occurred in *Vitozi v. Balboa Shipping Co.*[31] and *Lopez v. American-Hawaiian Steamship Co.*,[32] both of which cases concerned only the question of liability in an action in personam against the owner out of control.[33] The decision in *Pichirilo* cites these

27. See Leary v. United States, 81 U.S. (14 Wall.) 607 (1871); GILMORE AND BLACK, *op. cit. supra* note 2, at 218.

28. Thorp v. Hammond, 79 U.S. (12 Wall.) 408 (1870); The Barnstable, 181 U.S. 464, 468 (1901) (dictum); Santiago v. United States, 102 F. Supp. 425 (S.D. N.Y. 1952).

29. Lopez v. American-Hawaiian Steamship Co., 201 F.2d 418 (3d Cir. 1953), *cert. denied*, 345 U.S. 976 (1953); Cannella v. Lykes Bros. S.S. Co., 174 F.2d 794 (2d Cir. 1949), *cert. denied*, 338 U.S. 859 (1949); Vitozi v. Balboa Shipping Co., 163 F.2d 286 (1st Cir. 1947). The opinion in the latter case asserted that the demise prevented any action based on unseaworthiness against the general owner, irrespective of when the defect developed, but in Pichirilo, *supra* note 1, at 813, 814, Judge Aldrich notes:

> Possibly we erred in extending this rule [in the Vitozi case, *supra*] indiscriminately to cases where the unseaworthy condition preceded the demise. . . . But we see no reason to reconsider when, as here, the defective condition arose only after the owner had parted with all possession.

30. *Supra* note 29, at 795.

31. *Supra* note 29.

32. *Ibid.*

33. Both Vitozi and Lopez were longshoremen employed by demise charterers. Both decisions invoked the ownership of the demisee *pro hac vice* to defeat recovery in personam against the general owner for injuries caused by the unseaworthiness of the respective vessels.

cases with approval, and then concludes that in the absence of any personal liability (of the owner-demisor because of lack of control and of the demisee because of the workmen's compensation statute), in rem liability would be unrealistic because it could only be predicated upon an archaic notion of the "personification" of a ship which gives rise to independent liability. In this vein, the court stated:

> The concept of a ship as an individual may have an aura of romance befitting the lore of the sea, but to regard it as an entity having separate responsibilities independent of the primary legal responsibility of some human actor has little rational appeal. This is not to say that the "personification" of the vessel is not a convenient shorthand method of expressing legal results.[34]

But is control, or the ability to correct, the *sine qua non* of the in personam action? Could liability in rem have no other basis than the "personification" theory?

Assuming that liability for unseaworthiness need not be predicated upon negligence,[35] the conclusion is inescapable that the denial of recovery in personam in *Pichirilo* was based on a presumed transfer, from owner to demisee, of the duty to furnish and maintain a seaworthy vessel. Yet this proposition may be questioned in the light of principles set forth in the *Sieracki* case[36] and the case of *Alaska Steamship Co. v. Petterson.*[37]

In *Sieracki,* notwithstanding that the shipowner maintained control of the vessel during the loading process and that the injury was caused by ship's gear, the Court did not avoid the practical issue of control. Well aware that the loading operations were under the exclusive direction of the independent stevedoring contractor, the Court noted that the obligation of seaworthiness "is peculiarly and exclusively the obligation of the [ship's] owner . . . . It is one he cannot delegate."[38] The Court further indicated that in personam liability without fault, under these circumstances, was justified by the hazardous nature of marine service and the inability of seamen and longshoremen to protect themselves against the perils inherent therein, and accordingly concluded:

> Those risks are avoidable by the owner to the extent that they may result from negligence. *And beyond this* he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost. (Emphasis added.)[39]

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34. Pichirilo v. Guzman, *supra* note 1, at 814.

35. Mahnich v. Southern Steamship Co., *supra* note 12; Sieracki v. Seas Shipping Co., *supra* note 22.

36. *Supra* note 22.

37. 205 F.2d 478 (9th Cir. 1953), *aff'd per curiam,* 347 U.S. 396 (1954).

38. *Supra* note 22, at 100.

39. *Id.* at 94.

The facts of the *Petterson*[40] case more nearly approach *Pichirilo* in that, in the former, the vessel owner had released control to the injured stevedore's employer, albeit of only a part of the ship and only for a very limited time. However, the injury to Petterson did occur within that limited time, on that part of the vessel released, and as a result of defective equipment brought on board by the stevedoring contractor.[41] The Court of Appeals for the Ninth Circuit had rejected the argument that the shipowner was exempt from liability for unseaworthiness arising after surrender of control of the ship to the stevedores, reasoning that that theory could only be based on negligence, and that *Sieracki* unequivocally released the unseaworthiness action from its shackles of culpability. The court also indicated that it was impelled to its conclusion by "the reference in the *Sieracki* opinion to the 'common core of policy which has been controlling' which is found running through the decisions permitting longshoremen to recover from shipowners. . . ."[42] The court granted recovery in personam against the owner, and the Supreme Court affirmed per curiam.[43] In so holding, it relied solely on *Sieracki* and *Pope and Talbot, Inc. v. Hawn*,[44] a similar case wherein a carpenter, employed by an independent contractor, had been allowed to recover against the shipowner in an action based on negligence and unseaworthiness, the latter consisting of an uncovered hatch hole through which the libellant had accidentally fallen.

Bearing in mind the fundamental dissimilarity between *Petterson* and *Pichirilo* (*i.e.*, the existence of a demise charter in the latter), it may be questioned whether absolute liability in personam of the shipowner in the *Petterson* case is any less harsh than similar liability would be in *Pichirilo*, and if not, whether the magic appellation "owner *pro hac vice*" should be allowed to dictate such an inconsistency. In the *Vitozi, Cannella,* and *Lopez* cases,[45] Judge Aldrich found good authority for denying recovery in personam against the demisor; however, this rule seems to run counter to the "common core of policy."[46] It has been suggested that "the emphasis [in the area of unseaworthiness] has shifted from situs to status, from geography to policy."[47] Viewing the unseaworthiness action in perspective, from *The*

40. *Supra* note 37.

41. *Id.* at 479. It was not clear whether the offending equipment, which was a block, belonged to the ship or to the stevedoring contractor, but for purposes of the appeal, it was assumed to belong to the latter.

42. *Id.* at 480.

43. *Supra* note 37.

44. 346 U.S. 406 (1953). Justice Jackson's dissenting opinion, *Id.* at 419, contains an excellent account of the extreme privations encountered by seamen, which are responsible for their favored position as "wards of the admiralty."

45. *Supra* note 29.

46. Alaska Steamship Co. v. Petterson, *supra* note 37, at 480.

47. DiSalvo v. Cunard Steamship Co., *supra* note 17, at 819.

Osceola to date, it becomes apparent that a distinct philosophy has steadily developed, in consonance perhaps with an increased awareness of the unavoidable dangers encountered so frequently by all those performing the maritime service, and reflected in the great volume of personal injury litigation in this area. If the shipping industry is unable to eliminate these hazards, perhaps it may be expected to bear the costs of their results. As between Guzman and Pichirilo, little question is presented as to the better loss distributor.

Turning to the issue of liability of the *Carib* in rem, it must be borne in mind that Judge Aldrich considered the presence of personal liability a condition precedent to recovery in rem, and accordingly found for the respondent. In so holding he has leveled a challenge at the very essence of the maritime in rem proceeding,[48] at least insofar as it has been conceived in relation to the doctrine of unseaworthiness. The iconoclasticism of this challenge is enlightened by the dubious support accorded his decision by his best authorities. In *Burns Bros. v. The Central R.R. of New Jersey*,[49] a case involving collision, the Court of Appeals for the Second Circuit affirmed a finding of liability in rem even though the owner of the offending vessel had been personally exculpated in a prior adjudication.[50] In *Noel v. Isbrandtsen Company*,[51] the libellant's theory in rem was predicated on personal injury *apart* from any warranty of seaworthiness, and was summarily rejected by the court. Implicit in the language of the decision, however, is an assumption that personal liability would not be a condition of liability in rem in an action for unseaworthiness.[52]

Why then should liability in personam not constitute a condition precedent to a successful unseaworthiness action in rem? Why has this proposition remained unquestioned since its inception, when only a reliance or "personification" could sustain it? Is its sustenance still rooted in fiction? Or have other considerations dictated its retention?

It is noteworthy that Judge Learned Hand, in *Grillea v. United States*,[53]

48. See note 4 *supra*.

49. 202 F.2d 910 (2d Cir. 1953).

50. Burns Bros. v. Long Island R. Co., 176 F.2d 406 (2d Cir. 1949). The barge owner, Central R.R. of New Jersey, was exonerated because the collision had been chargeable solely to the negligence of the bailee and possessor of the barge, the Long Island R. Co., which was adjudged personally liable. The subsequent proceeding in rem (*supra* note 49), however, was necessitated by Burns Bros.' inability to satisfy its judgment against the Long Island R. Co., which had gone into reorganization.

51. *Supra* note 20.

52. Commenting on libellant's novel theory of liability in rem, the court noted:

> It is one thing to hold that a conviction or liability in personam is not a condition precedent to the action in rem; it would be quite another to say that the vessel may be held accountable as an entity *when there has been no violation of the warranty of seaworthiness*. . . . (Emphasis added.)

Noel v. Isbrandtsen Company, *supra* note 20, at 786.

53. 232 F.2d 919 (2d Cir. 1956). The action was brought by a longshoreman for

a case involving a demise charter, was likewise confronted by the thorny question of independent liability in rem in an action based on unseaworthiness. Relying on policy considerations, including the vessel owner's ability to distribute the loss, as set forth in *Sieracki* and *Petterson*, Judge Hand imposed liability, likening the in rem recovery to "a kind of 'Workmen's Compensation Act'; though limited by the value of the ship . . . ."[54] Nowhere in this opinion is there any mention of the "personification" of the ship. Judge Aldrich, in the *Pichirilo* decision, points out:

> [I]t is true that in *Grillea v. United States* . . . the court reached the opposite result. It did so without discussion, and with only the simple statement, "we see no reason why a person's property should never be liable unless he or someone else is liable 'in personam' " . . . . With all deference we think so novel a principle needs more support than a statement that the court sees no reason against it.[55]

But was not Judge Hand merely acknowledging what he considered settled law, and suggesting a policy as the real motivation for his rejection of the proposed qualification to independent liability in rem? Should liability in rem require, or depend upon, personal liability which would itself be independent of fault? If an unseaworthiness action in personam were to necessitate a showing of negligence, then the inconsistency of a naked recovery in rem would be patent; since, however, the liability in personam is absolute, it would seem unrealistic to encumber the action in rem with such a requirement.[56]

In *Crumady v. The Joachim Hendrik Fisser*,[57] the Supreme Court cited *Grillea* for the proposition that a turnover of control of a ship to a stevedoring company during unloading operations does not include a delegation of

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injuries sustained when he fell through a hatch. The hatch had been rendered unseaworthy by the libellant and his companion, who had placed thereon the wrong hatch cover. This condition had not existed when the respondent demised the vessel.

The libel was actually brought in personam against the United States because the Suits in Admiralty Act, 41 STAT. 525 (1920), 46 U.S.C. § 741 (1958) denies the right to a libel in rem against a vessel owned or chartered by the sovereign. However, the Suits in Admiralty Act, 41 STAT. 525, 526 (1920), 46 U.S.C. §§ 742, 743 (1958), grants a right in personam against the United States "wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained"; hence, the adjudication proceeded on principles applicable to a libel in rem against a vessel owned by a private person.

54. *Id.* at 923.

55. Pichirilo v. Guzman, 290 F.2d 812, 815 (1st Cir. 1961), *cert. granted*, — U.S. —, 82 Sup. Ct. 176 (1961) (No. 358).

56. Judge Hand observed in *Grillea* that, "[To say that a person's property should never be liable unless he or someone else is liable 'in personam'] would amount to saying that there should be no limited liability without fault, although unlimited liability without fault is not infrequently imposed." Grillea v. United States, *supra* note 53, at 924.

57. 358 U.S. 423 (1959).

the duty to maintain the vessel's seaworthiness.[58] The *Crumady* case was clearly distinguishable, however, from *Grillea* and *Pichirilo*, because it did not involve a demise charter and the libellant was not an employee of the negligent stevedoring contractor, whose liability, therefore, was not limited by the Longshoremen's and Harbor Workers' Compensation Act.[59]

The negligence of the stevedoring contractor in *Crumady* did permit of a third-party action whereby the respondent was allowed indemnity in a "recovery over" against the former, not however on a negligence theory but rather because of an implied indemnity provision in the contracting agreement.[60] In cases where such a written agreement between owner and independent contractor (who may also be a demisee) does exist, the courts have seized upon this contract to allow the vessel owner to recover over in a third-party suit based on breach of warranty (express or implied) of workmanlike service. This right-over allows ultimate liability to rest on the real offender but incidentally frustrates, by a circuity of action, the purpose of the Longshoremen's and Harbor Workers' Compensation Act.[61] In *Grillea* an express indemnity provision was alluded to by Judge Hand, but apparently not as a basis for his decision. While it might be contended that the existence of secondary liability was dispositive of the *Grillea* case, and that therefore *Pichirilo* (wherein no secondary liability existed, because the demise agreement was oral) stands apart even from *Grillea,* it should be noted that the third-party suit is always ancillary to primary liability. Since the issue of third-party liability can never arise until primary liability is fixed, any reasoning whereby the latter is made to depend upon the former seems unduly attenuated. Judge Aldrich noted that, "*Grillea* has resulted in some discussion of the effect of an indemnity clause in the demise . . . . We would agree . . . that the existence of an indemnity clause is beside the point."[62] Would not any other conclusion actually be a tacit admission that liability for unseaworthiness is not absolute and independent, but merely a convenient means of circumventing the limitations of the Longshoremen's Act?

58. *Id.* at 427.

59. 44 STAT. 1424 (1927), 33 U.S.C. §§ 901-950 (1959). This statute, which provides compensation for injuries occurring upon the navigable waters of the United States, allows the stevedore to recover against his employer to the prescribed extent or to elect to proceed independently against third persons.

60. The actual provision of the agreement from which the indemnity was implied was "to faithfully furnish such stevedoring services." Crumady v. The Joachim Hendrik Fisser, *supra* note 57, at 428. See Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124 (1956); see generally, White, *A New Look at the Shipowner's Right-Over for Shipboard Injuries*, 12 STAN. L. REV. 717 (1960).

61. *Supra* note 59.

62. Pichirilo v. Guzman, *supra* note 55, at 815.

Two recent opinions, *Leotta v. The S.S. Esparta*[63] and *Reed v. The Yaka*,[64] both virtually indistinguishable from *Grillea*, have accepted the reasoning of the latter. In *The Esparta* the court recognized that the demisee was owner *pro hac vice* and that the defect had not existed when the ship was demised, but concluded that "[t]he shipowner is always there in the background."[65] In *The Yaka*, the court, commenting on the demisee's ownership *pro hac vice*, noted, "That is a term of art,"[66] and pointed out that the shipowner "does retain the right to the return of his ship at some future time."[67] These cases clearly do not rely on "personification," but rather seem to invoke the owner-demisor's reversion in the ship in justification of independent absolute liability in rem, which thesis seemingly bespeaks a reliance on policy considerations.

It seems possible, then, that the personification theory, like so many other legal fictions, has served as a make-weight, allowing the courts to achieve what they considered reasonable results with minimal ripples on the judicial calm. As the principle becomes established, the fiction, having served its purpose, becomes obscure and is supplanted by the compelling considerations which justified its initial utilization. If this be true, then it would seem that the identical policy consideration, that is, a solicitude for the lot of those performing shipboard work because of the inherently dangerous nature of this calling, underlies recoveries in rem and in personam for unseaworthiness. Perhaps the unseaworthiness doctrine should therefore be considered a primary head of maritime liability, with complementary incidents of in rem and in personam recovery, rather than a theory somewhat subservient to these procedural devices. The Supreme Court, in *Pichirilo*, would then be presented only with the question: shall a longshoreman be precluded from bringing an action based on the unseaworthiness of a ship demised to his employer?

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63. 188 F. Supp. 168 (S.D. N.Y. 1960).
64. 183 F. Supp. 69 (E.D. Pa. 1960).
65. *Supra* note 63, at 169.
66. *Supra* note 64, at 76.
67. *Ibid.*